No. 592.

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JAMES H. McKENNEY,
Clerk.

Brf. of Atty. Gen.l (Richards)
Supt. (argt.)

In the Supreme Court

OF THE

UNITED STATES

Filed April 11, 1902.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for Said Territory.

ARGUMENT FOR APPELLANT.

BY

EDMUND P. DOLE

Attorney-General of the Territory of Hawaii.

HONOLULU:
HAWAIIAN GAZETTE PRINT
1902

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

The President of the United States having requested Governor Dole's presence in Washington, and Land Commissioner Boyd being still in Washington, Secretary Cooper, who will be Acting Governor during Mr. Dole's absence, has requested me to remain at my post in Honolulu. This compels me, at short notice, to submit in the form of a printed argument the substance of what I had intended to urge orally before this court.

JURISDICTION OF APPEAL.

The appeal to this court is taken under the provision: "That appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; * * * In any case that involves the construction or application of the Constitution of the United States." 26 U. S. 827, Sec. 5; as amended, 29 U. S. Stats. 492.

The United States District Court for the Territory of Hawaii is a legislative, not a constitutional, court. The provision of the Organic Act of the territory relating to appeals therefrom, in any case involving the application or construction of the Constitution of the United States, has not yet been judicially construed. Our Organic Act, both in this respect and as a whole, is so different from the Act of May 17th, 1884, providing a civil government for Alaska, and the United States District Court for the Territory of Hawaii is organized so differently from the United States District Court for the Territory of Alaska, that the Coquitlam Case, 163 U. S., 346, sheds little, if any, light upon the question of procedure in this case.

All parties interested are extremely anxious that the issue of constitutional law involved in this case may be settled by this court as promptly as possible, uncomplicated by any question of how it comes before this court. The counsel upon both sides, feeling that there might be a possible doubt in regard to the validity of an appeal direct to the supreme court, have signed a stipulation as follows:

"IN THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES OF AMERICA IN AND FOR THE NINTH JUDICIAL CIRCUIT.

"IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

STIPULATION.

"An appeal having already been taken and allowed in the above entitled case from the decision of the United States District Court in and for the Territory of Hawaii, to the Supreme Court of the United States, which appeal, now pending before said supreme court, has been set for argument on the 14th day of April, 1902; and a doubt having arisen whether such appeal lies directly to the Supreme Court of the United States, or directly to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and from thence to the Supreme Court of the United States; and both the said Osaki Mankichi and the Territory of Hawaii being desirous that the issues of constitutional law involved in said appeal should be decided by the Supreme Court of the United States, uncomplicated by questions of procedure, and as promptly as possible, Now, Therefore, It is Hereby Stipulated and Agreed that the appeal herein may immediately, without hearing, be certified by this court to the Supreme Court of the United States; and the parties hereto respectfully pray this honorable court that this appeal may be so certified.

"Dated at Honolulu, Island of Oahu, Territory of Hawaii, this 28th day of February, 1902.

"TERRITORY OF HAWAII,
"By E. P. DOLE,
"Attorney-General.

"OSAKI MANKICHI,
"By GEO. A. DAVIS,
"F. M. BROOKS,
"His Attorneys."

Pursuant to the above stipulation, an appeal was duly taken from the United States District Court for the Territory of Hawaii to the Circuit Court of Appeals, Ninth Judicial Circuit, which appeal, I presume, has been certified to this court.

The issue of constitutional law involved in this case is, therefore, before this court by both of the possible routes, and the question which is the proper route is eliminated.

Jurisdiction of the United States District Court.

My first proposition is that the Judge of the United States District Court of Hawaii erred in assuming jurisdiction to pass upon a question of constitutional law which had already been decided by the Supreme Court of the Territory.

I shall submit this branch of the case without attempt at argument. I do not see how it is possible to present it more clearly or more strongly than Judge Estee himself has done in the matter of the habeas corpus of William Marshall. I have quoted at length from this decision in my brief. The cases are cited and extracts given.

The Constitutional Issue.

While I believe that Judge Estee exceeded his jurisdiction, I shall be greatly disappointed, and the counsel upon the other side will be greatly disappointed, if the decision of this august tribunal turns upon this question. The ghosts of the transition theory and the ghosts of the anti-transition theory have haunted the Hawaiian courts, federal or territorial, for nearly four years. They will not down except at the mandate of this, the highest court in the land. Inferior territorial judges have declared from the bench that the decisions of the supreme court of the territory are not law, and have defied them, proceeding as if such decisions had never been rendered. The supreme court cannot agree with itself, and a majority of its members hold to one theory, while the United States District Court of the territory, overruling itself, now holds exactly the contrary theory. For about two years these courts

have played battle-door and shuttle-cock with nearly every felon in the territory convicted between the twelfth day of August, 1898, and the fourteenth day of June, 1900. Under these conditions, a prompt and decorous administration of justice has been impossible. It will be impossible until this grave constitutional question, in regard to which there is such an honest and irreconcilable difference of opinion, is settled. All parties in interest wish that Judge Estee's error—if he made an error in assuming jurisdiction—shall not stand in the way of an early and final adjudication of the constitutional question involved. Upon such adjudication depends the validity or nullity of every conviction of felony obtained in Hawaiian courts for a period of about two years.

The Insular Cases—to which I shall refer from time to time, and more fully later on—and the elaborate researches of counsel engaged in them, shed light upon this question; but the question itself now comes before this court for the first time. It is, I believe, absolutely without precedent in jurisprudence, because the same conditions have never before existed in history. This is, I believe, the first instance in the history of the world where an independent and civilized nation has voluntarily surrendered its national sovereignty and public property to a great and friendly power, awaiting for a period of nearly two years such form of government as might ultimately be given it.

The Territory of Hawaii does not ask this august tribunal for favors. It is the province of this court to dispense justice and law, not favor. The territory does not ask that the Constitution of the United States be set aside, or perverted, or strained, in behalf of the people of Hawaii. The territory simply asks that its broad, eternal principles of justice and common sense, interpreted in the light of such adjudicated cases as exist, may be applied to new conditions.

The first ten amendments to the Constitution of the United States are limitations of Federal power. They do not apply to states. This doctrine was established by Chief Justice Marshall almost ninety years ago. The meat of *Barron v. Baltimore*, like that in many another great opinion, is compressed in a few sentences. What is it? Simply that states have all the powers they have not given away, while territories, in the organic sense, have only the powers given them.

The severing of the ties of the thirteen original colonies with the mother country, if there had been nothing more, would have made them thirteen independent nations. By forming a confederacy, they parted with a portion of their sovereignty. What they did not part with they kept. In forming a more perfect union, they parted with other powers. What they did not part with they kept. Chief Justice Marshall interpreted the constitution in the light of the facts and conditions that gave it birth and of the manifest intentions of its framers. His opinion is great—and, like most great things, is simple.

In this connection I wish to call the court's attention to one other settled principle. Although a territory, in the organic sense, has only such powers as Congress gives it, Congress can give it statehood, and in so doing makes it co-equal with its thirteen original sisters. Massachusetts, an original colony, has the powers she did not give away. California, a created state, has the powers that were given her, in all respects equal to those of Massachusetts.

Congress cannot authorize a federal court to try any person for a capital or otherwise infamous crime except upon presentment by a grand jury; or to sentence any person for such crime except upon the unanimous verdict of a petty jury. Yet Congress, in creating a state, gives it absolute power to abolish the whole jury system in its own courts.

It seems to me as plain as plainness that if Congress can give this power to a state, it can, pursuant to treaty obligations, refrain from taking it away from a sovereign nation surrendering its sovereignty—at least for such time, pending the organization of a new government, as may be indispensable for the protection of life and property and the maintenance of law and order.

Before commenting upon the terms of the contract between these two nations, I wish, with the court's permission, to quote the material portions of the documents which embody it.

"The President (of the Republic of Hawaii), with the approval of the cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate." Article 32 of the Constitution of the Republic of Hawaii.

The treaty made in pursuance of this provision, ratified by the Hawaiian Senate September 10th, and by President Dole September 11th, 1897, provided that: "Article III. Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. * * * The municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaty so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States nor to any exising treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The Newlands Resolution declared that, "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged. * * * So long * * * as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided for, said government shall continue to pay the interest on said debt. * * * No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. The President shall appoint five commissioners, * * * who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

The surrender of sovereignty on the part of the Republic of Hawaii, and its acceptance on the part of the United States, was in the following language:

Minister Sewall said: "Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled 'Joint Resolution to Provide for Annexing the Ha-

waiian Islands to the United States.' This Joint Resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."

President Dole replied: "A treaty of political union having been made and the occasion formally consented to by the Republic of Hawaii having been accepted by the United States of America, I, now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands."

Whereupon Minister Sewall said: "Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government."

By direction of President Dole the Hawaiian flag was then lowered and the American flag was raised by direction of Minister Sewall.

In his proclamation, President McKinley, after reciting the terms of the Joint Resolution, declared "that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies. * * * That the municipal legislation of Hawaii (subject to the exceptions set forth in the Joint Resolution) was to remain in force until the Congress of the United States should otherwise determine." The President ended his proclamation with the significant statement, "Under these various provisions the government of the islands will proceed without interruption."

The United States was a nation of seventy or eighty millions of people. The Republic of Hawaii was a nation of one hundred and forty thousand. By international law, they were equally high, contracting sovereign powers: but there was no

equality of physical strength. The words of President Dole were strikingly appropriate to the question before this Court: "With full confidence in the honor, justice and friendship of the American people." We had "full confidence in the honor, justice and friendship of the American people," and believed they were leaving us the right to protect our lives and property, and the lives and honor of our wives and children, under the laws we had, until new laws should be given us. We believed that we had safe-guarded this right in the treaty which we made, so plainly and so securely that there could be no occasion to come before this, the highest tribunal in the land, asking that the plain language of the treaty should be interpreted in conformity with elemental justice.

We ask nothing but such a fair and reasonable construction of our treaty as is consistent with the Constitution of the United States.

There is no question of conquest in this case. It was a voluntary treaty, entered into for the benefit of both parties; and, although people on the Atlantic Coast may not yet realize it, quite as much for the benefit of the great republic as for that of the little one. As it was purely a matter of treaty, of contract, it follows that what we did not concede to the United States, the United States did not get.

We ceded—I am quoting from the Newlands Resolution—"absolutely and without reserve to the United States of America, all rights of sovereignty."

What does this mean? It means that we gave Congress the right to make any laws for us, and impose any form of government upon us, permitted by the Constitution of the United States, or that may hereafter be permitted by an amended Constitution of the United States. It means that, having "full confidence in the honor, justice and friendship of the

American people," and retaining neither voice nor vote, we surrendered our future destinies to them, in trust for their good and for ours.

What did we retain? We retained the municipal legislation of the Hawaiian Islands, not contrary to extinguished treaties, nor inconsistent with the Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States—until the Congress of the United States should otherwise determine.

In commenting upon these treaty rights, Mr. McKinley, in his proclamation, said: "Under these various provisions the government of the islands will proceed without interruption."

I feel sure that this court will interpret the documentary evidence, not by a narrow construction of a single phrase, but as a whole, in the light of historical facts and in the broad and catholic spirit of the Constitution of the United States. Interpreted in such a spirit, what is the meaning of this transaction? Simply that the Republic of Hawaii, having "full confidence in the honor, justice and friendship of the American people," surrendered its future destinies to the United States, absolutely and without reserve; and, in the meantime, until Congress should have opportunity to investigate, weigh, consider and act, retained its existing institutions and form of government, its municipal legislation for the protection of life and property and other local purposes.

In the interpretation of a contract, the intention of the parties is the pole star. In case of doubtful or ambiguous expression, the vital question is, what did they mean by what they said? What is the fair interpretation of what they said, viewed in the light of surrounding circumstances, their acts at the time, and their subsequent conduct?

In this case I see no room for an intelligent difference of opinion in regard to their intentions. For international pur-

poses they understood that, with annexation, the Republic of Hawaii had ceased to exist, as the Kingdom of Prussia ceased to exist in an international sense when Bismarck created the German Empire. For local purposes it existed until it was replaced by the organized Territory of Hawaii. In all official communications between the government at Washington and the government at Honolulu, Mr. Dole was still addressed as the President of the Republic of Hawaii; he drew his salary from the Hawaiian treasury, pursuant to Hawaiian law, as President of the Republic of Hawaii. The powers of the Minister of Foreign Affairs, so far as they related to foreign affairs, necessarily ceased; but he retained his title and performed the local duties attached to his office. No other change was made in the duties, titles or personnel of Hawaiian officials. When vacancies occurred, they were filled in the same manner as when Hawaii was an independent nation. The American flag floated over public buildings. The American Minister became Presidential Agent. The other foreign diplomats became resident consuls. This was substantially all the apparent change. The Republic of Hawaii became a dependent government, retaining many of the functions usually exercised only by independent governments—its tariff system, its postal system, its consular system. United States consuls continued to discharge their duties in Honolulu and Hilo. Letter postage to the United States was five cents instead of two cents. Imports from the United States paid Hawaiian duties. Exports to the United States paid Federal duties. It is foreign to this case whether these provisions of the Resolution were valid or invalid, if they shed light upon the intent of the contracting parties acting within their constitutional power. Could anything more conclusively prove the intention and understanding of Congress, of the President of the United States, and of the Government of the Republic of Ha-

waii, that the Constitution of the United States was not to be extended in toto until further legislation? As Mr. McKinley said, the government of the islands was to proceed without interruption.

Mr. McKinley appointed Senator Cullom, Senator Morgan, Representative Hitt, President Dole and Chief Justice Frear commissioners pursuant to the Newlands Resolution. Upon their arrival in Honolulu, the American members of this commission requested the views of the Hawaiian government in regard to its political status, pending reorganization under such form of government as Congress might subsequently see fit to give it. Mr. W. O. Smith, then Attorney-General, requested me to write an opinion. The opinion which I then wrote was, in substance, my position before this court. It was accepted as the opinion of the Hawaiian government, unanimously accepted by the President and Cabinet of the Republic of Hawaii, and it met the views of the American members of the commission. It was unanimously sustained by the Supreme Court of the Republic of Hawaii. Judged by his official acts and correspondence, which are matters of record, the theory of the Hawaiian government, in this respect, had Mr. McKinley's approval from first to last.

The construction which parties put upon a contract by their acts, is the strongest possible evidence of how they understand it. To quote in substance the language of Mr. Justice Brown, in *De Lima v. Bidwell*, the understanding and acts of the two governments "are entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction be erroneous."

A statute is not contrary to the Constitution of the United States if no provision of that Constitution applies. Trial by ordeal in darkest Africa is not contrary to the Constitution of

the United States, because no provision of the Constitution applies there. Trial in a state court for a capital or otherwise infamous offense, without presentment by a grand jury, is not contrary to the Constitution of the United States, because the Fifth Amendment does not apply to states. Sentence for such offense upon a verdict less than unanimous is not contrary to the Constitution of the United States, because the Sixth Amendment does not apply to states. These amendments do not apply to states or limit their power, because, as Chief Justice Marshall said, contemporaneous history shows that they were not intended to apply to states or limit their power. Portions of the Constitution apply to states and not to territories. Portions apply to territories and not to states. Portions to states and territories alike, and at least one provision, that relating to human slavery, applies to every foot of land within the dominion of the United States.

The Hawaiian Islands ceased to be an independent nation in 1898. They did not become an organized Territory of the United States until 1900. There was a transition period, unless, for a period of about two years, they were deprived of the legitimate protection of civilized government. They safeguarded against this calamity by treaty, made while they were a sovereign nation. It was one of the principal conditions in their surrender of sovereign rights. It was not an acceptance of such powers as Congress saw fit to give them. It was a retention of powers expressly reserved.

If this court applies the reasoning of the great John Marshall, in *Barron v. Baltimore*, to the treaty between the United States and the Republic of Hawaii, and to contemporaneous history, it must hold that the words "nor contrary to the Constitution of the United States" have no reference to the Fifth and Sixth Amendments; because, during the transition period, the Fifth and Sixth Amendments had no more

application to the Republic of Hawaii than they have to the State of Massachusetts or to the State of California.

It seems to me that history leading up to annexation, as well as the history of annexation itself, has a bearing upon the question which now comes before this court for the first time. For the court has before it a broad field, which must take into account existing conditions and historical facts.

The Hawaiian Islands were a clump of petty monarchies for unknown ages prior to their discovery by Captain Cook. A great man, as the world counts greatness, came to the front in the latter part of the eighteenth century and the half dozen kingdoms were hammered and fused into one. Kamehameha I. was Moi, God-King, and a dark-skinned barbarian. But he made life and property safe, as it never had been before. Indeed, for the past one hundred and seven years life and property have been safer in the Hawaiian Islands than in most parts of the civilized world. He promulgated wise edicts; he encouraged industries; he built up commerce; he negotiated treaties with the United States, with Great Britain, with Russia, and with China. He was recognized in Europe and America, not as a savage chief, but as the head of an independent nation.

His successor, Kamehameha II., who ascended the throne in 1819 and died in 1824, was received at the Court of St. James with royal honors.

More than sixty years ago Kamehameha III. gave his people a written constitution. According to ancient ideas he was supreme law maker, dispenser of life and death, a divine being sent by the gods to rule men for a short space, and then return to the gods from whence he came. As the old mele put it: "All men, all things that breathe, are the Moi's: the land is his: the sea is his: the bird of the air is his, and the dead

whale, cast up by the waves." More than sixty years ago Kamehameha III., heir to these traditions of divine right and absolute power, gave his people a written constitution, embodying the elemental principles of civil and religious liberty. It was not wrested from him as Magna Charta was wrested from King John; it was a voluntary and a royal gift.

An act of the first legislature, held sixty years ago, required every child in the Kingdom to learn to read and write. Compulsory education, for good or for evil, has been the law of the Hawaiian Islands ever since, and it has been generally enforced.

In 1848 came the great Mahele, by which Kamehameha III. set apart one-third of the land for the maintenance of the government and the dignity of the crown; one-third for the chiefs, and one-third for the common people. The royal patents issued pursuant to this great act are the source of land titles to the present day.

It is not presumptious, considering the conditions which surrounded him and the smallness of his stage, to class Kamehameha I. with the great men of history; and Kamehameha III., Kamehameha IV. and Kamehameha V. sincerely, and with such light as they had, sought their people's good. The dynasty which ruled the Hawaiian Islands for the first three-quarters of the nineteenth century will compare favorably with most dynasties of civilized lands. No doubt the great Kamehameha was largely influenced in his broad and far-seeing policy by John Young, an English sailor of great ability and common sense, who was premier for something like thirty years. No doubt the constitution and the great Mahale of Kamehameha III. were due to the influence of the missionaries. No doubt educated white men of high character were an important factor in shaping the reigns of Kamehameha IV. and Kamehameha V. Still, the fact remains, that in

these far-off Polynesian islands, for a period of towards a century, there was a native dynasty which was more humane and more just than the dynasties of Europe have usually been.

The principles of civil and religious liberty took such deep root under this remarkable line of kings, that Anglo-Saxon ideas and institutions continued to develop during the reigns of their successors. Constitutional government has been maintained for sixty years. It has never been stained by acts of cruelty, and if at times it has been corrupt, at times it has been exceptionally pure—even according to Anglo-Saxon standards. The higher courts in particular were clean, from their organization in the early forties until the organization of the Territory in 1900. As far as I have ever heard, every supreme court and every circuit court judge, with perhaps one exception, appointed during this long period had the reputation of being an honest man. The scandals which sometimes disgraced the executive and legislative departments of government, never extended to the higher judiciary as long as Hawaii was an independent nation. While some of these judges had but limited preparation for their high office, others were lawyers of ripe scholarship and distinguished ability. It is a significant fact that Judge Lynch has never held court in Hawaii. For nearly sixty years, the lawful tribunals had the confidence of the community.

At the time of annexation a great industry had grown up which furnished a considerable portion of the sugar used in the United States. Many lesser industries contributed to the business stability and prosperity of the islands. Commerce was in a most flourishing condition. There were houses that dealt with every part of the civilized world. The business honor of Honolulu merchants had become proverbial. The like may be said of the government. Never in the history of the country, either under the monarchy or under the repub-

lic, was a government bond or other obligation dishonored. Public improvements had made great progress. Many millions of dollars had been expended upon churches, schools, colleges, museums, hospitals, upon the institutions that uplift and humanize a people. Small and remote as these islands were, the evolution of more than a hundred years had made them a free, civilized, enlightened Christian republic, the only independent nation in the tropical world of anything like the same character and advancement. It was a nation which had demonstrated its capacity for self-government and its ability to take care of itself under most trying circumstances.

The United States has repeatedly enlarged its domains by conquest and by treaty. It annexed the Republic of Texas, taking it into the Union as one of the United States. But these acquisitions are not in point. The Republic of Hawaii surrendered independent nationality and waited nearly two years until Congress gave it a new government to take the place of its old one. This was by contract. It is inconceivable that either party to the contract intended that a rich, civilized and enlightened community should be left for an indefinite period, bound hand and foot, at the mercy of the criminal classes. Here was a little nation with a history, that, considering its recent beginnings in barbarism, can proudly challenge comparison with Massachusetts or Virginia or Ohio or California. Its relations with the United States had always been of the closest and most friendly character. The government of the United States is the government of a great and just people, a government utterly incapable of closing the courts even of a vanquished enemy, and leaving that enemy helpless to help itself, exposed to murder, lust and pillage. That the government of the United States should have intended to put a friendly and confiding people in that plight is beyond human belief. Such conduct would be a breach of

trust, without parallel in the atrocities committed by civilized nations. Such intention cannot be imputed. Such intention could not have entered into the contract and the intent controls. When the American people carry their flag to a foreign land, they do not smite down the institutions that maintain law, order, protection from crime. They uphold them. They must uphold them until there is opportunity to change them. The broad and catholic spirit of the Constitution of the United States demands it. Humanity demands it. The elemental law which God has put in men's hearts demands it, and civilized people cannot shut up the courts and put unoffending men, women and children at the mercy of cut-throats and robbers.

The Hawaiian Islands were not unorganized territory. They were not possessions acquired from a foreign power by conquest or by treaty. For about a hundred years they had been recognized as one of the sovereign nations of the earth. They were a civilized and progressive nation, and if community of religious ideas has any bearing upon international law, they were a Christian nation. The principle is the same whether their civilization was eighty years old, or fifteen hundred years old; whether they had one hundred and forty thousand citizens, or thirty millions. Suppose the United States, instead of annexing the Republic of Hawaii, had annexed the Republic of France: had done away with the old legal machinery, and, without supplying new, had prorogued the French legislative assembly, thereby depriving the French people of the power to do so, and had left France, for nearly two years, practically without law. The civilized world, with one voice, would have cried, Impossible!

If the Fifth Amendment to the Constitution of the United States came to the Hawaiian Islands with the flag, then for nearly two years the courts had no lawful authority to try any

one for crime; and what had been a sovereign nation was suddenly relegated to the natural rights of self-protection, which exist where there is no law. The grand jury system had never been adopted. Indictments based on the records of the committing magistrate were signed by the attorney-general, or his deputy, and the presiding Judge, as they are in several of the United States. The bi-ennial session of the legislature had recently come to an end. If a special session had been called to provide for summoning and paying grand jurors, there would have been a hiatus of months, and the result would have been problematical. Was a civilized community to be left without protection from criminals for three months, or even for one month? But the summoning of the legislature was within the control of the President of the United States, or was supposed to be so, and instead of sanctioning a special session, Mr. McKinley postponed the regular session of 1900; so that there was no session of the Hawaiian Legislature from 1898 until 1901. This shows that the government at Washington understood that Hawaiian courts had power to perform the necessary functions of courts. The proclamation of President McKinley, referring to the Newlands Resolution was to the same effect: "Under these various provisions the government of the islands will proceed without interruption."

The framers of the Constitution of the Republic of Hawaii were not hampered by State jealousies as were the framers of the Constitution of the United States. The Constitution of the United States had been in operation for more than a hundred years. The framers of the Constitution of the Republic of Hawaii had the advantage of careful study of the merits and defects of the Constitution of the United States as a working instrument, as well as a careful study of the unwritten Constitution of England, the written Constitution of the

French Republic, the most excellent Constitution of the Swiss Republic, and an intimate acquaintance with local conditions. Whether the grand jury system and unanimous verdicts were wise under the conditions which faced the makers of the Constitution of the United States, is one question. Whether such provisions were wise under the conditions which faced the makers of the Constitution of the Republic of Hawaii, is a very different question. At any rate, these provisions had never existed in the Hawaiian Islands.

Right here I wish to make what seems to me a material suggestion. The municipal legislation of the Hawaiian Islands required that native cases should be tried by native juries and foreign cases by foreign juries. With that provision in force, with the grand jury system and with the requirement that jurors should be citizens of the United States, in three, if not in four of the five judicial circuits, a sufficient number of foreign jurors to go round could not have been obtained by summoning the cradle and the grave, and a native jury would have been an impossibility. As it was, in three of the five circuits, intelligent and qualified white jurors were so few that the same men were compelled to serve term after term and year after year—and, under the law, they were not necessarily citizens of the republic.

The Constitution of the United States is supreme in every state in the Union. No state can make any constitutional or statutory enactment contrary to the Constitution of the United States. Yet, from the time of Chief Justice Marshall, it has been held that the Fifth and Sixth Amendments, requiring indictment by grand jury and conviction by unanimous verdict, do not apply to the states. Do not international good faith, justice, reason, common sense and common humanity demand a like construction of the Fifth and Sixth Amendments in dealing with a civilized nation, which has

surrendered its sovereignty and has nothing but the old machinery for maintaining law and order and protecting life and property, until a new government is organized?

During the period in question Hawaiian courts were neither federal nor territorial. Judges held commissions from the President of the Republic of Hawaii. A majority of them were citizens of the Republic of Hawaii; one or two were citizens of the United States; one was a British subject.

About sixty years ago, when Kamehameha III. gave his people a Constitution, a bright young foreign lawyer passing through Honolulu, was invited to remain, organize a judiciary department and be chief justice. He did so and filled the position with great credit until his death. This is but a single illustration. An isolated people, emerging from barbarism and eager to take a place among civilized nations, sought out competent white men to teach them and lead them. But it often happened that these white men were unwilling to renounce allegiance to the land of their birth and the protection of its flag. So there grew up and was sanctioned by constitutional and statutory provisions a system of denizenship, under which persons of foreign birth might hold the highest offices short of the crown or the presidency of the republic, without being citizens or voters. This system continued until the organization of the territory. Nothing is more foreign to American ideas than a British subject presiding over an American court. Yet a British subject was one of the ablest and most honored members of the Hawaiian judiciary at the time of annexation, and continued in office until the organization of the territory.

The same system applied to juries. Under the monarchy and under the republic, jurors were divided into native and foreign, foreign not necessarily by birth, but by ancestry. A typical foreign jury consisted of perhaps three or four men of

pure white blood, citizens of Hawaii by birth, and the remainder, Americans, Englishmen, Scotchmen and Germans, who, although they might have resided in the Islands the greater part of their lives, were not citizens. This system, like the system of appointment to office, was made necessary by the peculiar conditions alluded to. It resulted in getting white juries equal in sterling honesty, and superior in experience, to the best juries of rural New England, the representative white men of the Hawaiian Islands. Outside of Honolulu there was not sufficient material for juries of this high grade, if citizenship had been a requirement.

The mere fact of annexation did not make a British subject, holding a commission from the President of the Republic of Hawaii, an American judge. The mere fact of annexation did not make British and German subjects, sitting before that judge, American jurors. The system, under the conditions which gave it birth, was wise and necessary; but it was not American. It was inconsistent with the theory of American courts. There was no American court in the Hawaiian Islands, federal or territorial, until the Republic of Hawaii ceased to exist and Congress created the Territory of Hawaii. They were Hawaiian courts, and there was no authority of law for making them American until Congress gave it. Under the Newlands Resolution and the proclamation of the President of the United States, they were to proceed "without interruption."

The Republic of Hawaii surrendered its sovereignty to the United States pursuant to contract. The contract contemplated, and both parties perfectly understood, that the functions of civilized government were to continue "without interruption," and, as nearly as possible, on the old basis until a new government should be provided. The Hawaiian flag was lowered August 12th, 1898, and the American flag was

raised. This was symbolic livery of seizin, and nothing more. The tenant was left in possession. The Republic of Hawaii ceased to exist as a foreign nation. Its relations with foreign powers came to an end. It became, not a state, not a territory, but a possession, a dependent government authorized to conduct its local affairs substantially as before, until its needs could be ascertained and a new government organized. The acts of the parties to the contract, which put this interpretation on it, have passed into history.

I submit that there is not a phrase in the Newlands Resolution which extends the Constitution of the United States to the Hawaiian Islands, except such provisions thereof as go with the flag *ex proprio vigore*.

"Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." If the Newlands Resolution and the transfer of sovereignty made the Hawaiian Islands, not a mere possession, but an integral part of the United States, this provision violated Section 8 of Article I. of the Constitution of the United States, which declares that: "All duties, imports and excises shall be uniform throughout the United States." Yet it was a material part of the treaty between the two countries. It involved nearly half the revenue of the Republic of Hawaii. If this provision was beyond the constitutional power of Congress, one of the main considerations for the surrender of sovereignty failed, and the Republic of Hawaii was entitled to resume its independence.

"The existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." This was a remnant of national sovereignty which was not taken away, or attempted to be taken away, until the

Organic Act went into effect. During the entire transition period the government of the United States recognized it as a binding obligation. It has passed into history.

The exclusion of Chinese,—"No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands,"—amounted to an emphatic declaration that the Republic of Hawaii was not to be an integral part of the United States until further legislation.

"Nor contrary to the Constitution of the United States." Congress cannot continue, authorize or validate any legislation contrary to the Constitution of the United States. Yet Congress can create a state from a territory; and the state can adopt a constitution, dispensing with grand and petty juries. Such state constitution would not be contrary to the Constitution of the United States because the first ten amendments do not apply. If the United States, within its own borders, can create a quasi sovereignty, to which its own constitutional provisions for grand and petty juries do not extend, how much more, in accepting a surrender of sovereignty by a foreign nation, can it leave it to the operation of its own jury system until its laws can be changed intelligently!

The United States, within its own confines, leaves Indian tribes free to make and administer their own laws, treating them as dependent nations. If Congress can do this, as the federal courts say it can, most certainly it could leave an enlightened republic in the Mid-Pacific the necessary functions of civilized government, until a new government could be provided.

The discussions of the Insular Cases by the eminent counsel engaged in them, and by this court, have covered an immense range of research. This great tribunal, aided by some of the best minds of the American bar, has critically and ex-

haustively studied the bearing of these cases. In reviewing them—if it becomes necessary to review them to ascertain their bearing upon this case—the court will certainly bear in mind Chief Justice Marshall's wise words—which, it seems to me, the learned judge of the United States District Court of Hawaii has failed to do—"that general expressions in every opinion are to be taken in connection with the case in which those expressions are used."

I have found nothing in these cases—either in the majority or in the minority opinions—which seems to me in conflict with the position I take before this court.

In *De Lima v. Bidwell*, Mr. Justice Brown, delivering the opinion of the majority of the court, begins with the statement: "This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' *within the meaning of the tariff laws.*" The words "within the meaning of the tariff laws" limit the application of the case.

In the course of his opinion in this case, Mr. Justice Brown quotes and comments approvingly upon President Buchanan's statement that "the great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." A page further on, in this opinion, Mr. Justice Brown states the following as an established proposition: "The civil government established in California continued *from the necessities of the case* until Congress provided a territorial government."

In the dissenting opinion of Mr. Justice McKenna, Mr.

Justice Shiras and Mr. Justice White, Mr. Justice McKenna quotes Mr. Justice Johnson, in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, as follows: "'The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession.*' The italics are ours. All the history and utterances of the past declare the same way."

Both the majority and minority opinions in the De Lima case are in harmony with my claim, and, as far as they go, they sustain it, that the Fifth and Sixth Amendments to the Constitution of the United States were not extended to the Hawaiian Islands until the taking effect of the Organic Act.

In *Dooley v. United States*, Mr. Justice Brown, delivering the opinion of the majority of the court, closes as follows: "In our opinion, the authority of the President, as Commander-in-Chief, to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued *until Congress should constitutionally legislate upon the subject.*" The words "until Congress should constitutionally legislate upon the subject" eliminate from the decision every possible construction adverse to the position which I take before this Court.

On the other hand, Mr. Justice White, speaking for himself, for Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice McKenna, says: "The rule of the immediate bringing, by the self-operating force of a treaty, ceded territory inside of the line of the tariff laws of the United States, denies the existence of powers which the Constitution expressly bestows, over-

throws the authority conferred on Congress by the Constitution, and is impossible of execution. * * * * * * * * *

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* * * Suppose a treaty of cession which embraces territory producing in large quantities the articles upon which the existing tariff laws mainly rely for revenue to sustain the government. If, instantly, on the ratification of the treaty, before Congress can remodel or change the laws so as to provide for the support of the government, the articles stated coming into the United States from the country in question would be within the tariff line, and thereby entitled to free entry into the United States, what would become of the power of the House of Representatives and of the Congress upon the subject of revenue as provided in the Constitution? It may be said in answer to this suggestion that Congress could make the change, and whilst of course a brief interval of disaster would ensue, during which there would be no revenue, the country must suffer the consequences during such interval. But does this follow? Suppose the political state of the country should be such that there was a difference of opinion as to the policy to be embodied in a tariff law, analogous to that which existed when California was acquired from Mexico, where, in consequence of division on the subject of the slavery question between the different branches of Congress, it was impossible to enact legislation conferring a territorial government upon California, what would be the situation then? Look at it practically from another point of view. Certainly before revenue laws can be made operative in a district or country it is essential that the situation be taken into account for the purpose of establishing ports of entry, collection districts, and the necessary machinery to enforce them. Of course, it is patent, that such investigations cannot be made prior to acquisition. But, as the laws immediately extend, without action of Congress, as the result of acquisition, it must follow that they extend, although none of the means and instrumentalities for their successful enforcement can possibly be devised until the acquisition is com-

pleted. This must be, unless it be held that there is power in the government of the United States to enter a foreign country, examine its situation, and enact legislation for it before it has passed under the sovereignty of the United States. From the point of view of the United States, then, it seems to me that the doctrine of the immediate placing of the tariff laws outside the line of newly acquired territory, however extreme may be the opinion entertained of the doctrine of immediate incorporation, is inadmissible and in conflict with the Constitution. * * * * * * * * * * * * *

* * * All these suggestions, however, it is argued, but refer to expediency, and are entitled to no weight as against the theory that, under the Constitution, the tariff laws of the United States took effect of their own force immediately upon the cession. But this is fallacious. For, if it be demonstrated that a particular result cannot be accomplished without destroying the revenue power conferred upon Congress by the Constitution, and without annihilating the conceded authority of the government in other respects, such demonstration shows the unsoundness of the argument which magnifies the results flowing from the exercise by the treaty-making power of its authority to acquire, to the detriment and destruction of that balanced and limited government which the Constitution called into being."

In *Downes v. Bidwell*, Mr. Justice Brown, delivering the opinion of the majority of the court, said: "Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Nothwithstanding its duty to 'guarantee to every state in this Union a republican form of government' (Art. 4, Sec. 4), by which we understand, according to the definition of Webster, 'a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate, in the original organization of the Territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Mich-

igan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habaes corpus, as well as other privileges of the bill of rights.

"We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the right, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States'; in the case of Mexico, that they should 'be incorporated into the Union, and be admitted at the proper time

(to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States'; in the case of Alaska, that the inhabitants who remained three years, 'with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights', etc.; and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants * * * shall be determined by Congress'. In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto. * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals." * * *

"Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question

whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafer acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

"There is a provision that 'new States may be admitted by the Congress into this Union'. These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new Territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the

government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley, Const. Lim., Secs. 81-85. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

"Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about condition which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmation, said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred

from one nation or sovereign to another the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superceded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until by direct action of the new government, they are altered or repealed. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255; Halleck, International Law, Chap. 34, Sec. 14.' * *

"The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force. *

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"The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a do-

mestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."

Mr. Justice Gray, concurring, said: "If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to all the restrictions of the Constitution."

I have been greatly impressed with the ability of the Solicitor-General's argument in these cases. I wish to recall a paragraph or two to the attention of the court:

"'Protection to life, liberty, and property rests primarily with the States', as Chief Justice Fuller said in *In re Kemmler* (136 U. S., 438, 448). 'The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws,' said Mr. Justice Catron in *Permoli v. First Municipality* (3 How., 589, 609). The Constitution forbids the states to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or to grant any title of nobility, and the fourteenth amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; but outside the range of these limitations the people of the state, through its constitution and laws, are supreme. They can define treason against the state as they see fit; they can limit the freedom of speech and of the press; they can restrict the bearing of arms; they can provide for the quartering of troops; they can regulate the right of search and of arrest; they can provide for the trial of capital or otherwise infamous crimes upon information and without indictment, and without a jury, and they have done so. They can do away with the trial of civil suits by a jury. And they may do many other things which I need not enumerate.

"The right of the people of the states to change their laws and system of procedure so as to make them conform to changed views of administration, or the exigencies of their

social life, has been sustained. If the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a territory when organizing a state, why should they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

"It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, if the limitations intended for the states at once of their own force applied in these new possessions, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the National Government helpless by demanding impossibilities. Until the progress of the people of these Territories will permit of the organization of courts and juries after our system, these guarantees must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned. The situation resembles that discussed in the case of *In re Ross* (140 U. S., 453), where a conviction of murder by a consular court in Japan, acting without a jury and upon information, was sustained, Mr. Justice Field saying (p. 464): 'And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution'.

"In dealing with our new possessions, due regard for their traditions should be shown. They have been accustomed to the jurisprudence of the civil law. It would be the height of tyranny and oppression to compel them to abandon it without good cause. In providing them a system of local government,

should we not keep in mind what Mr. Justice Brown, speaking for the court, said in the recent case of *Holden v. Hardy* (169 U. S., 366, 389): 'In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had no previous acquaintance or sympathy."

I find nothing in a single opinion given in the Insular Cases conflicting with what it seems to me must be the law of the case now before this court. There can be no doubt about the intention of the parties. The Republic of Hawaii would never voluntarily have surrendered its sovereignty upon any understanding that the ordinary functions of its courts should cease for an indefinite period, and that meantime it should be without protection from the criminal classes. Neither the United States nor any other civilized government would ask or desire such a concession. It was what both parties supposed they had provided against. Mr. McKinley said, "Under these various provisions the government of the islands will proceed without interruption." If the parties intended this, as they certainly did, and if justice and national good faith require that their intentions should be executed, the language of Mr. Justice Brown in *De Lima v. Bidwell* is in point: "If there is an admitted wrong the courts will look far to supply an adequate remedy."

Although, as I believe, the Insular Decisions, as far as they go, sustain the contention of the Territory of Hawaii, it does not rest its case upon them alone. Its position is unique in

history and without precedent in jurisprudence in this, that, while an independent nation, it stipulated, subject to certain exceptions, that its form of government and municipal legislation should continue unchanged until Congress should provide a new government. This was a reservation of power, bringing it directly within the principle and reasoning of *Barron v. Baltimore*. Representing the Territory of Hawaii, I stand on its treaty rights.

For fifteen centuries men who claimed to be followers of Christ spent their time in constructing elaborate systems of theology and in persecuting those who dissented. But the Master said, love God and your neighbor. That is all there is to it. Under that divine searchlight these finely spun scholastic religions become empty words. The analogy holds with legal principles. Scholars, case lawyers, elaborate, elaborate and elaborate until everybody is befogged. A great mind, like the mind of John Marshall, evolves a few sentences and truth breaks through the fog and shines like the sun in heaven. The decision of Chief Justice Marshall in *Barron v. Baltimore* is pure, terse reasoning applied to well-known historical facts. I may be mistaken, but it does seem to me that if this court applies the same reasoning to similar historical facts—even stronger, because here the understanding of the parties is plainly expressed in a solemn treaty—if the court does this, the Territory of Hawaii must go hence with its appeal sustained.

More than eighty years ago American missionaries planted the seeds of American civilization in the Hawaiian Islands. In the days of the monarchy, as well as in the days of the republic, Fourth of July and Decoration Day were almost universally observed. On every street the American flag and the Hawaiian flag floated side by side.

When the Spanish war broke out the fighting strength of the American Navy was not understood, and the weakness of Spain was unknown. There was a Spanish fleet in the Pacific; Hawaii was a few islets in mid-ocean, defenceless even against Spain. Had George Dewey lost the battle of Manila there was nothing to prevent Honolulu from being laid in ashes and her people being put to the sword. Yet, when war became imminent, the Hawaiian government tendered the advantages of its harbors and geographical position to the United States. When war actually broke out, and three days before the news of the battle of Manila reached Honolulu, President Dole wired President McKinley offering him the alliance of the Republic of Hawaii. Honolulu was instantly made a base of supplies for American transports and American ships of war. More than one hundred thousand dollars was spent by citizens of Honolulu in feasting and entertaining American soldiers and sailors. They marched through our streets by thousands, laden with tropical fruit and garlanded with flowers. Government property was placed at their disposal, and they were entertained officially at the Capitol. The Spanish government, by its representative in Honolulu, protested against this violation of neutrality. The reply of the Hawaiian government was prompt: "We are not neutral; we stand with the United States."

Small and weak as we were, our geographical position enabled us to render enormous service. The people of the United States and their government have not forgotten it. The American government has always been generous to us; it has always been just, except when it has been misled by false statements. It has accepted the surrender of Hawaiian sovereignty as a public trust, in the spirit of President Dole's words, "I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship

of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands." In the same spirit of confidence, the Territory of Hawaii now submits to this august tribunal the question whether the Republic of Hawaii, during what is known as the transition period, had the right to maintain law and order and protect her citizens from criminals.

E. P. DOLE,
Attorney-General, Territory of Hawaii.

John K. Richards,
Solicitor General